

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

EFRAIN MEDINA,

Appellant.

No. 38885-5-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A Pierce County jury found Efrain Medina guilty of one count of second degree assault with a deadly weapon for assaulting Cassie Gepford with a knife, count I, RCW 9A.36.021(1)(c); a special verdict for use of a deadly weapon other than a firearm, former RCW 9.94A.602 (1983); and one count of fourth degree assault for assaulting Gepford's girl friend, Myhanh Poland, count II, RCW 9A.36.041(1) and (2). Both assaults were acts of domestic violence under RCW 10.99.020 and occurred at Medina's University Place apartment on September 2, 2008, when the women were trying to retrieve a Chihuahua dog that Medina had given Gepford while he and Gepford were dating. The trial court sentenced Medina to serve 38 months on the second degree assault with an additional 12 months enhancement on the deadly weapon special verdict. It also imposed and suspended a 365-day sentence¹ on count II which it

¹ The conditions of Medina's suspended sentence include that he maintain law-abiding behavior, participate in domestic violence and drug and alcohol evaluations and treatment.

tolled “during any period of time the offender is in confinement for any reason.” Clerk’s Papers (CP) at 81.

In this appeal, Medina challenges only his second degree assault conviction and contends, for the first time on appeal, that the evidence was insufficient to support the jury verdict and that the trial court’s instructions were defective because they relieved the State of the burden of proving the essential elements of the crime beyond a reasonable doubt.² We disagree and affirm.

Discussion

The State charged Medina with second degree assault as follows:

That [Medina], in the State of Washington, on or about the 2nd day of September, 2008, did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, intentionally assault [Gepford] with a deadly weapon, to-wit: a knife, contrary to RCW 9A.36.021(1)(c) and in the commission thereof the defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

CP at 1.

The trial court’s jury instruction number 6 read:

A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

CP at 25.

Instruction number 7 defined assault:

An assault is an intentional touching or striking or cutting of another

² Medina couches his assignments of error 4 through 7 as challenges to the trial court’s to-convict instruction. We note that Medina did not except to the trial court’s giving of these instructions as CrR 6.15 requires. But the gravamen of Medina’s argument is a challenge to the sufficiency of the evidence which may be challenged for the first time on appeal.

person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 26.³

The elements instruction, number 11, informed the jury:

To convict the defendant of the crime of assault in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 2nd day of September, 2008, the defendant assaulted [Gepford] with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP at 30.

On appeal, Medina contends that read together and in their entirety, the trial court's jury instructions relieved the State of the obligation to prove that Medina (1) intended to create in Gepford's mind apprehension of bodily harm, (2) that Gepford had a reasonable apprehension of harm, (3) that Medina was armed while committing assault in the second degree, and (4) that Medina attempted to inflict harm on Gepford. Although Medina acknowledges that our Supreme

³ This is a proper statement of the definition of assault which is defined by common law in Washington. See *State v. Elmi*, 166 Wn.2d 209, 215-16, 207 P.3d 439 (2009); *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Court in *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), held that jury instruction number 7 defining assault does not provide alternate means of committing that crime, he maintains that the instruction creates additional elements requiring the State to prove an intentional touching, an intent to inflict bodily injury, as well as an intent to create a reasonable apprehension and fear of imminent bodily injury in another. Attempting to distinguish *Smith*, Medina partitions the evidence, arguing that the various assaultive acts obscure the basis for the jury's verdict and required the giving of a separate unanimity instruction. *Smith* is on point and controls our decision here.

Although the evidence was disputed at trial, due in large part to Gepford's having reconciled with Medina, the record clearly established that Gepford, Poland, and another woman, Barbara Stephens, went to Medina's University Place apartment on September 2, 2008, to retrieve a Chihuahua that Medina had "kidnapped" when Gepford had been moving her belongings out of Medina's apartment earlier that day. Medina had given Gepford the dog while the two were living together, but that night, in a telephone call with Gepford, he had threatened to kill it. Fearing for the dog's life, the three women went to Medina's apartment.

Gepford walked into Medina's apartment and picked up the dog. Stephens waited outside the apartment door while Poland remained in the car. After Gepford entered the apartment, Medina shut and locked the door, yelling and blocking her exit. Unable to leave, Gepford became scared and began screaming. Medina had a knife in his hand and told Gepford that he was going to hurt her. Gepford testified that she felt concerned about the statement and felt threatened by Medina's body language while he held the knife. When Gepford asked if Medina planned on stabbing her, he threw the knife on the couch. Gepford screamed for help and finally managed to

run out the apartment door but Medina grabbed Gepford's hair. Poland left the car and tackled Medina. Poland struggled with Medina to free Gepford but Medina maintained a grip on Gepford's hair and continued to attempt to kick Gepford. Eventually, Medina released Gepford and began punching and biting Poland. Stephens and Gepford took the dog and went down the stairs to their car. About this time, Gepford, an epileptic, had a seizure which she testified resulted in her forgetting many details of what happened after she left the apartment.

Stephens testified that when looking through the apartment door, she saw Medina walk up behind Gepford holding a large knife behind his back. Stephens identified Exhibit 1 as the knife she saw Medina holding during the incident. Medina realized Stephens was at the door, came at her with the knife, and then shut the door. Stephens called 911 when she heard Gepford yelling from inside the apartment. She had to run down the stairs to find the apartment complex address to give to the 911 dispatcher. Stephens identified the 911 tape of her call which was played for the jury. When Stephens returned to the apartment, she saw Medina holding Gepford by the hair and Poland holding onto Medina. Law enforcement officers quickly responded to Stephens's 911 call.

Poland apparently believed that Medina had stabbed Gepford and told Pierce County Sheriff's Deputy Buddy Mahlum that Gepford had been stabbed with a knife which was still in the apartment. Mahlum arrested Medina and seized the knife from Medina's couch. Gepford told responding police that Medina had tried to stab her but did not succeed.

For his part, after being read his *Miranda*⁴ warnings, Medina admitted to arguing with Gepford about the dog but denied having a knife. Medina smelled strongly of intoxicants but

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

answered questions coherently.

Due process requires the State to prove each element of the charged crime beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). Our review of the record establishes that when viewed in the light most favorable to the jury's verdict, on the evidence presented, any rational trier of fact could have found that Medina armed himself with a knife and assaulted Gepford. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). Here substantial evidence supports the jury's verdict finding Medina guilty of assault in the second degree with a deadly weapon in violation of RCW 9A.36.021(1)(c).

Gepford reluctantly testified that Medina held a knife in his hand and told her he intended to hurt her. She felt threatened by Medina's body language which included threatening physical motions with the knife. Although she denied recalling the statement at trial, on the night of the incident, Gepford told Deputy Scott Mock that Medina had tried to stab her but had failed.

Under *Smith's* controlling authority, the jury was not required to find that Medina

intentionally touched Gepford in an offensive manner and intended to inflict bodily injury and to create in Gepford a reasonable apprehension and fear of imminent bodily injury. But even if it were required to meet that burden of proof, our review of the overwhelming evidence appearing in this record establishes that it did so. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.